

**Approved 7/18/07**

**TOWN OF CUSHING  
PLANNING BOARD  
Minutes of Meeting  
June 28, 2007**

**Board Present:** Chairman Dan Remian, David Cobey, Bob Ellis, Evelyn Kalloch, Frank Muddle, CEO Scott Bickford and Recording Secretary Deborah Sealey

**Absent:** None

**1.Call to Order:** Chairman Remian called the meeting to order at 6:03 P.M., took a roll call and stated that this special Planning Board meeting was a continuation of the June 20, 2007 meeting.

**2.Approve the Minutes of the 6/6/07 meeting:** The members had just received the minutes that morning, so took twenty minutes to read them. Mr. Cobey requested three changes in wording.

**ACTION:** Mr. Ellis made a motion, seconded by Mr. Cobey, to accept the minutes of the 6/6/07 meeting as corrected.  
Carried 4-0-1 (Mr. Muddle abstained)

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Ellis, to table acting on the 6/20/07 minutes.  
Carried 5-0-0

**3. Communications:** Chairman Remian said the Board had received two letters: one from abutter Ms. Miller and one from Mr. Tower. Mr. Remian agreed that Mr. Tower had submitted his information on time, but said it was returned to him at the meeting because it was incomplete. Secondly, he said the Board was well aware that the applicant had the right to appeal. Thirdly, the chairman said he routinely asked, on the record, if the applicant would allow the Board to extend decision deadlines when additional information was requested. He acknowledged that Mr. Tower had submitted additional information, including the soils on Lot 1, the day before.

**4. Old Business:** Mr. Ellis, referring to effectively granting a variance at the last meeting, said that type of variance was exactly what the Shoreland Zone Ordinance [SZO] allowed. Though it was allowed for dimensional reasons only, Mr. Ellis had concluded that only the Board of Appeals could grant a variance. Mr. Cobey stated that the Planning Board could only grant a waiver of the design standards. Mr. Ellis read aloud from the MMA manual that only the Board of Appeals could grant a variance. There was further discussion of statute.

**ACTION:** Mr. Muddle made a motion, seconded by Mr. Remian, that, since the Planning Board had no authority to grant a waiver to this requirement, and the change would be considered a variance and therefore be referred to the Appeals Board, that the motion passed on 6/20/07 regarding the waiver be rescinded.  
Carried 5-0-0

The Board then discussed making a recommendation to the Board of Appeals. Mr. Cobey said that Subs. 8.2(C) of the Subdivision Ordinance [SO] stated that the PB "shall not" approve for development any portion of a proposed subdivision that is located within a fresh water or coastal wetland; therefore, he could not vote for this. Mr. Ellis said the language in (B) and (C) did not account for the fact that there were allowances for those things. Mr. Cobey said he was not sure they were discussing a coastal wetland because he was not sure it was tidal. Mr. Ellis asked how this was different from the allowable impact anywhere else in the subdivision, where restricted disturbances were allowed. Mr. Cobey said the town had a standard that did not reflect federal practice. Mrs. Kalloch said that lot was largely in wetlands, with the flood plain and 75' setback also coming into play. Mr. Ellis said that Subs. 2.4 of the SO said that these regulations must agree with state statutes and case law, which he felt this (8.2C) did not. Mr. Muddle quoted the SZO Table of Land Uses, "Resource Protection areas can be used for non-intensive recreation uses not requiring a structure." With PB approval, he said, they could be used for public or private recreation facilities. Mr. Ellis said this looked like another instance of simultaneous review.

**ACTION:** Mr. Remian made a motion, seconded by Mr. Ellis, to recommend to the Board of Appeals that, should the applicant file an appeal, that it consider a variance to the size and dimensional requirements of the common area for recreational purposes, with the condition that, based on the 5/3/07 layout of vehicular

surfaces by Engineering Dynamics, they add the condition that no trees or vegetation be removed from the site except for that construction and for a 6' access to the water.  
Carried 5-0-0

**5.Continuation from June 20 of Robbins Mountain Subdivision Review for Completeness, Map 5, Lots 84, 85 and 86:** Mr. Cobey referred to last meeting's vote on 9.1(D) of the SO, concerning flag lots. He said he had spoken with Ham Boothby, hoping to understand the intent of that section, but Mr. Boothby had been unable to recollect. As a result, Mr. Cobey felt the language of both 9.1(D) and 9.2(B) was ambiguous. Mr. Cobey said he would like to change his 6/20/07 vote on flag lots.

Mrs. Kalloch agreed that those lots did not have narrow strips; however, Subs. 9.1(D) did say, "Lots in which narrow strips are joined to other parcels in order to meet minimum lot size requirements are prohibited." She said it looked as though Lot 2, because of the 10,000 Sq. Ft. residential meadow buffer, did not have 40,000 Sq. Ft. of buildable space. Mr. Cobey said he felt that kind of buffer could be an easement on a lot. Mr. Remian said a residential buffer was actually a filtration buffer for drainage and, therefore, not usable. Mr. Cobey said the intent of 9.1(A) was to exclude lands unsuitable for development as defined in the ordinance. Mr. Muddle, acknowledging Mrs. Kalloch's point, said the owner would not build a 40,000 Sq. Ft. house but could enjoy the view of areas he could not build on. Mrs. Kalloch argued that other causes could make it unusable, but the rest of the Board disagreed.

*CEO Bickford arrived at 7:00 P.M.*

Mr. Cobey asked Mr. Tower who was responsible for maintenance of driveway and trail easements. The developer said the driveway was the responsibility of the lot owner who enjoyed the benefit of the easement and all lot owners would maintain the trail easement. Mr. Tower said, whether in a common area or easement, the Homeowners' Association would maintain all elements of the storm water management plan. Mr. Tower confirmed this would include residential meadow buffers.

The chairman said he had checked with the PB's attorney's office, which had concluded that Cushing's ordinance prohibited flag and odd-shaped lots, though the language could be clearer. Mr. Ellis interpreted the MMA manual as saying that whenever the ordinance contained vague language it was the Board's responsibility to protect the applicant's rights. He said the intent of 9.1(D) was not met because the pole of the flag was not added in order to meet minimum lot size requirements.

**ACTION:** Mr. Muddle made a motion, seconded by Mr. Ellis, that Subs. 9.1(D)'s reference to flag lots does not apply to Lots 2 and 11.  
Carried 3-2-0 (Mrs. Kalloch and Mr. Remian voted against)

Mr. Cobey said there were many items the Board had requested on 6/6/07. In addition, he had discovered an 8/3/06 (signature date) DEP application, which he had never seen before, in the office; he had been dealing with the DEP application of June 2006. He asked whether the 8/3/06 application was the updated one the Board had requested, noting that it included additional documentation. Mr. Cobey said he was daunted by the frequency of meetings and felt very unprepared and resentful that he had to meet without previous meetings' minutes and without knowing if he was reviewing the most recent information. Mr. Cobey said he was not prepared to continue at this time.

Mr. Tower said he had redone his DEP application because the storm water basin would not work and because DEP had questions; he said those changes had been in the plan since 4/18/07. There was a lengthy discussion of the different applications, both to the DEP and the town, and when the 8/3/06 application appeared. Mr. Tower said the DEP application signed on 8/3/06 was complete, though there may have been changes to it since. He concluded by saying that, while the town and the Board were entitled to review the DEP application, the only action the Board could take on it was to know of its approval prior to approving the subdivision application or making its approval contingent on the DEP approval.

Mr. Ellis said that a list of things had kept the Board from speedy review and he agreed with Mr. Cobey that he did not feel prepared. Mr. Remian concurred, saying this special meeting had been called because the applicant felt the Board had not worked hard enough to complete its review within the 60-day window. He said the applicant had not been asked at the last meeting to approve the extension because he had failed to submit some requested items. Mr. Ellis said he also felt pressured for speedy review and his main concern was to be sure the Board was meeting its responsibilities within the process. Mrs. Kalloch said the members had different opinions on interpretation of the ordinances.

Mr. Tower granted that the Board had a short time to review submissions, as he had to prepare them. He said he now felt some optimism that his application would not be denied and need to go before the Board of Appeals, so he was willing to table the application until the 7/18/07 meeting. He hoped that he could encourage the Board of Appeals to meet on the variance before that date and suggested that the Board identify any areas of concern that had not been identified.

Mr. Remian said he would like the applicant's engineer to check the drawings to see that everything was included, including the 75' buffer. Mr. Cobey said he had expressed his concerns on a list, dated today, which he distributed to the Board and applicant. He summarized this as proposing some additional information, independent evaluation and additional items to go on the plan. Following are Mr. Tower's responses to Mr. Cobey's list (see attached) and any subsequent discussion:

**Proposed additional information needed:**

1. TOWER: No, there's a later storm water plan (SW2), which you will get.
2. TOWER: I don't understand.
3. TOWER: OK.
4. TOWER: No clearing will be done as part of the subdivision. That will be a separate activity.
5. TOWER: I have given the limits and constraints in the covenants.  
COBEY: The landscaped areas permitted on each lot need to add up. The storm water management plan is affected by the owners knowing the limits of what they can do. I want the maximum cleared area noted on each lot because people won't pay attention to the covenants.  
TOWER: Unless you have a defined standard there is no way we can determine if we meet it.
6. TOWER: No.  
COBEY: I want to get a better picture of the final natural environment. ELLIS: It is not one of our requirements to have the amount of land clearing shown. COBEY: Mr. Tower's application to the state has said he will provide erosion and sediment controls for his roadway construction, but not for anything outside the roadway. He has also said he is limiting the amount of land that can be disturbed by a lot owner to a certain total acreage, both of which affect runoff. ELLIS: The criteria burden of proof is to show that it is adequate for the areas under construction by the developer; the storm water management plan is for the infrastructure that will be installed. I'm concerned that the questions underlying your proposal for independent evaluation may be answered by the DEP. Couldn't the PB send those questions to the DEP? BICKFORD: This is actually a decision that will be made through the review criteria when you vote, so you need to satisfy yourselves; otherwise, you will be calling all sorts of specialists. TOWER: Two meetings ago we discussed the fact that a subdivision is dividing land into smaller units and creating the infrastructure: what happens on the lots later is not the applicant's responsibility. COBEY: That's a specious argument. You will get a permit from the DEP based on certain criteria for runoff and I think it's important to make those criteria have teeth, which only involves putting some information on a plan. I don't understand your unwillingness to do that. TOWER: The state says that the mere cutting of trees is not considered disturbance of land. The standard here is "unreasonably adverse disturbance". REMIAN: I'm concerned about erosion and sediment and whatever you disturb in this area, I've got some questions. TOWER: We've been through all those criteria and you've made a positive finding of fact. KALLOCH: We had some that we tabled. COBEY: We tabled erosion.
7. TOWER: No. All clearing debris will be moved to an adjacent existing stump dump. We will use all wood cut to its highest and best use, including chipping.

**Proposed independent evaluation need:**

- 1 & 2: TOWER: I think the evidence presented is adequate for the Board to make its review, but the Board can obtain whatever it wants for an independent evaluation. We're going to have a statement from DEP on this issue in a very short time. It is your prerogative to go for an independent review, but I decline to pay for it.

**Proposed conditions:**

1. TOWER: I think the same standards apply there as in the SZO, with the exception of the point count.
2. Mr. Tower listed every paper that would have this information.
3. TOWER: No.
4. TOWER: A) They will be pinned and identified on every drawing given to each lot owner. B) Each will have a copy of the DEP board order, C) We have to obtain from them a written statement that they have received these and D) We have to include in the deed specific reference to all of those things and obligate people to abide by them. Many of these things are redundant.

5. TOWER: Can you explain that? COBEY: On the west side there is an outflow from the filtration basin into wetlands and our regulations call for placing drainage ways in easements. TOWER: The outflow from a storm water filtration basin is designed to restrict the rate of discharge to less than before. Try to get as much water absorbed into the ground as possible. Discharge is very minor and goes into an existing wetland already protected by law. An easement has to benefit someone: who would be the beneficiary? COBEY: I thought there was a drainage swale that went down from that point. No valley formed in there? TOWER: There is, but I'm guessing that it follows the wetland more than is indicated by the contour. COBEY: OK, it just stays on your property and doesn't go anywhere else? TOWER: The discharge is designed to be returned to sheet-flow. REMIAN: Will the SW2 drainage show the basin outflow detail? TOWER: Yes. REMIAN: No culvert is shown under Pleasant Point Road on the west? TOWER: True, but there is one there that we can show. REMIAN: And the driveway? TOWER: Yeah, there probably ought to be one there. COBEY: The water going into this culvert and the drainage area from the culvert to the river has no more flow than there is today? TOWER: In fact, less. See the filtration basin between Pleasant Point Road and the entrance? There's a culvert that catches all the storm water drainage on both sides of the road and puts it into that basin, retains it and allows it to infiltrate into the ground.
6. TOWER: The storm water management plan is already in the easements or ROW of the road. Erosion and sedimentation control – some are and some are not in the easements.
7. TOWER: Done. COBEY: Buffers, also? TOWER: Done. COBEY: Can we add the word easement so people will know? ELLIS: The covenants already have this detailed.
8. TOWER: The DEP permit is filed in the Registry of Deeds and contains the language that does all the things Mr. Cobey is asking here. I don't like redundancy and the registry version should be stripped down to give the geometry of the entire subdivision so any surveyor can reconstruct it on the face of the earth and an attorney doing title search can make a determination that any conditions attached are satisfied.
9. TOWER: Already done. REMIAN: Have your covenants changed since your March or June version? TOWER: I don't believe so.
10. TOWER: DEP has it's own document that binds the applicant and any other entity to whom the requirements are transferred and that has to be included in our covenants, if it is not now.
11. TOWER: There is a dual responsibility for driveway access and easements by the owner and the user, but not the HOA. ELLIS: Note 4 on the plan states that all common areas, fire ponds and roads shall be maintained by the HOA. TOWER: Your regulations require that statement to be there.
12. TOWER: I would respectfully suggest that if you look in the basic governmental structure of the deed covenants, the HOA has the ability to assess whatever fees or costs are necessary for routine maintenance or unanticipated costs.
13. TOWER: The covenants and responsibilities run with the land and not with the owners. COBEY: When does the HOA take over those costs? TOWER: Just as soon as I can give it to them - I don't want it. The Board order probably gives me 30 or 60 days to do that.
14. TOWER: I will follow the forestry management practices of the Maine Forest Service. We are required to abide by their performance standards and we will.
15. TOWER: I agree with that, but it doesn't need to be on the plan.

Mr. Ellis said some of the items on this list were required by Cushing's regulations and some things proposed may or may not be the wishes of the entire Board.

**ACTION:** Mr. Cobey made a motion, seconded by Mr. Remian, to table the application until the next regular meeting, with the consent of the applicant, until we feel prepared to continue with the review.  
Carried 5-0-0

## **6. Other Business:**

Mr. Remian said his motion had been that the Hornbarn Hill Subdivision drawing be approved for the removal of the well restriction zones only. Mr. Muddle said that pins had been relocated on Lots 1, 2, 3, 4 and 10, which changed the water frontage dimensions on those lots, but the acreage did not change. Mr. Tower said the lot sizes and shapes did not change, although the location of the pins on some of the lines may have changed. Mr. Remian interrupted to say this should not be discussed because it was not on the agenda. The Board asked for a note on the plan that read, "This plan amends prior plans for only removing all well restrictions zones."

## **7. Adjournment:** The meeting adjourned at 8:35 P.M.

Respectfully submitted,  
Deborah E. Sealey  
Recording Secretary